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CITY OF LAFAYETTE
PLANNING DEPT.

LAW OFFICE OF DAVID J. BOWIE
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November 17, 2008

Christine Sinnette
City of Lafayette,
3675 Mt Diablo Blvd, Suite, 210
Lafayette, CA 94549

Re: Dick Holt Application /Lot 66/Sierra Vista Way, Lafayette, CA

Dear Christine:

This will confirm my earlier discussion with you regard the assemblage of documentation for the next hearing before the City Council as to the Dick Holt Application.

I understand that your staff report for the next meeting will be relatively short due to the comprehensive record of materials submitted to the City Council at the first hearing on the appeal. I would request, however, that you extract the following documents and attach them for easy reference to your supplemental staff report to be represented at the next hearing: My letter dated May 29, 2008, Rick Human's letter regarding hydrology dated August 21, 2008, the Schell & Martin letter dated July 21, 2008, Dick Holt's notes dated June 18, 2008 and information regarding Variance Application submitted September 4, 2008.

I appreciate your attention to this matter. Please call me should you have questions.

Best regards,

David J. Bowie

Cc: Dick Holt

Sinnette, Christine

From: Monica Johnson [monica@bblandlaw.com]
Sent: Thursday, May 29, 2008 1:05 PM
To: Sinnette, Christine
Cc: Holt, Dick; David Bowie
Subject: City Of Lafayette 5-29-08

LAW OFFICE OF DAVID J. BOWIE
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May 29, 2008

Lafayette Planning Commission
c/o Christine Sinnette
City of Lafayette,
3675 Mt Diablo Blvd, Suite, 210
Lafayette, CA 94549

Re: Lot 66/Sierra Vista Way, Lafayette, CA
HDP 47-07

Dear Planning Commission Members:

Approximately one year ago, Dick Holt submitted an application for Design Review approval for construction of a new single family home on Lot 66 at Sierra Vista Way in Lafayette. The application was controversial and a final decision had yet to be made at the time the Permit Streamlining Act necessitated that some action be taken. Mr. Holt withdrew the application so that he could better address a number of concerns which had been voiced by Planning Commission Members. The application has now been resubmitted and will be considered at the Planning Commission hearing set for June 5, 2008.

At the time of the initial application, a substantial amount of time was expended in addressing the issue as to whether or not the right of way easement consisting of Sessions Drive in some fashion extended across the entirety of the subject property—Lot 66, The City Attorney has quite properly pointed that Sessions Drive is private and that easement disputes are private matters to be resolved amongst the private property owners affected. I had previously pointed out to the City Attorney, staff, and this Commission that there was no legal easement which adversely impacted the entirety of Lot

66—although obviously a portion of the Lot was impacted by an acknowledged right of way easement. Since this particular easement issue was already addressed at the time of initial application and is not a matter for determination by this Commission, further discussion of the legal issue is essentially irrelevant.

It has come to my attention that Carol Hehmeyar and other neighbors apparently persists in raising this issue of the legal impact of a right of way easement across Lot 66. This letter is designed to provide Commissioners with the legal background to my professional opinion that the easement issue is irrelevant to this particular application. As a practical matter, the information of this letter is intended as background since I whole heartedly agree with the City Attorney and her conclusion that the Commission need not consider this issue at all.

The only way to understand the impact of easements upon this particular Lot 66 is to thoroughly review the record title in the context of the applicable law. The following is a summary of both:

A. Grant Deed—Sessions to Western Title recorded February 9, 1966. This document is the first significant document for purposes of analysis. It is a grant deed that includes a description of "Parcel 12". Parcel 12 is Lot 66. The conveyance specifically "excepts" from said Parcel 12 a non-exclusive right of way as an appurtenance to the remaining lands of the grantor or any portion thereof. This document actually makes it clear that Lot 66 is greater than whatever right of way might burden the particular lot by virtue by of use of the word "except".

B. Indenture Agreement—The single most important document in the chain of title is an agreement between Western Title, Sessions, and Alberdan Inc recorded January 31, 1967 in Book 5296 at Page 435. That document indicates as its purpose the elimination of various rights of way and the creation of new rights of way over a 50 foot wide strip of land known as Sessions Drive as described by metes and bounds "...and over Lot 66..". The indenture makes clear that all prior rights are eliminated with a single 50 foot wide road created as described by metes and bounds and over Lot 66.

Subparagraph B of the Indenture has Sessions granting to Western Title the rights of way which were excepted from Parcels 1 and 12. Therefore, at this subparagraph of the indenture, easements over Lot 66 are simply eliminated.

Subparagraph C of the Indenture specifically grants to Western Title a roadway easement which includes a roadway over Lot 66. Subparagraph D grants to Western Title the rights to Western Title to alter the location, width, and grade of the easement described and makes specific reference to the "strip of land on Lot 66 known as Sessions Drive".

Paragraph 1 of the Indenture reaffirms the right to alter the location, width and grade of the entirety of Sessions Drive, "...including that strip of land over Lot 66 known as Sessions Drive...". The final paragraph of paragraph 1 of the Indenture confirms that the various easements referenced in other parts of the Indenture, including any easements over Lot 66, are easements on or over the underlying strip of land known as Sessions Drive. That same paragraph specifically provides that whenever the location of Sessions Drive is altered as provided for in the Indenture, the easements are thereby altered in the same way.

Paragraph 6 of the Indenture speaks in terms of landscaping on Lot 66 "...to the extent not inconsistent with Western's plans for the use and improvement of Lot 66."

The repeated references to "strip of land" and the context make clear that less than the entirety of Lot 66 was and is to be subject to the right of way easement and, further, that the precise location of the right of way would be up to Western Title—as well as the precise width and grade.

C. Grant Deed---Sessions to Pitchford recorded January 31, 1967 in Book 5296 at 440. Parcel 3 of this particular grant refers to a non-exclusive easement over Lot 66. This reference has sometimes been cited for the proposition that all of Lot 66 was subject to easement requirements. This Sessions grant deed to Pitchford, however, cannot possibly have created any easement which encompasses the entirety of Lot 66. The most apparent reason is that Sessions had already grant deeded to Western Title rights of easement and those rights and easements were and are limited to a 50 foot wide strip of land subject to further adjustment as Western Title might deem appropriate

D. Most recently, the Hehmeyers have claimed that they and their immediate neighbors collectively have easement rights that are not particular to time and are clearly more inclusive than the limited rights which obviously exist as a matter of record title. The Hehmeyers, however, are incorrect in their contentions.

E. Petar Jakovina grant deeded property to Howmark Inc., a California Corporation, in 1998. I gather the Howmark deed was a predecessor deed to the Hehmeyer's deed. That particular grant deed was recorded as Document No. 98-0049049-00. The legal description grants to Howmark all four parcels of Parcel Map MS 502-94. The grant deed to Howmark included as Parcel 2 a non-exclusive easement which impacts Lot 66. That particular non-exclusive easement, however, refers to the easement created by Parcel Map MS502-94. It might be noted that there is also a Parcel B as a part of that same grant. Parcel 3 is a further non-exclusive easement for ingress and egress and it cross-references the Sessions to Pitchford deed recorded January 31, 1967 in Book 5296.

The Parcel 3 reference to a non-exclusive easement cannot be an easement as to the entirety of Lot 66 because it is derivative from the Pitchford easement discussed above. In both cases a greater estate cannot be granted than the estate owned at the time of grant construction which exceeds the grant to Western Title simply cannot be countenanced.

The Parcel 2 easement of the Howmark Inc grant deed is also non-exclusive and is based upon MS 502-94. Unfortunately for the Hehmeyers and their neighbors, however, Parcel Map MS 502-94 on its face references a non-exclusive access and utility easement at Book 5054, page 439. That particular reference is the original grant deed from Sessions to Western Title Guaranty Company. It was recorded as Instrument No. 10509 on February 9, 1966. The problem is that the Indemnity Agreement was later recorded and the Indemnity Agreement specifically reconveyed all prior easements of all kinds and sort with the same to be recreated as Western Title deemed appropriate pursuant to the terms of that agreement. In short, the reference in MS 502-94 to a non-exclusive easement which in turn is picked up in the grant deed to Howmark is an inaccurate reference as it was superseded by later events which recreated the 50 foot easement discussed above and at issue in this matter.

For what it is worth, I have reviewed these matters with Schell and Martin, the engineering firm which created Subdivision MS 502-94. That firm agrees with my interpretation and confirms that the reference is actually inaccurate.

From the foregoing it is clear that any actual grant must be limited to a non-exclusive right of way of not more than 50 feet in width. A subsequent grant deed from Howmark to and of the current neighbors could not increase the estate beyond that owned at the time the grantor executed the grant deed. In other words, and quite basically, the neighbors' contentions that they hold greater easement rights encompassing the entirety of Lot 66 are simply not supported by the facts or record.

Regardless of the foregoing discussion regarding record title and rights conveyed, California Black Letter Law requires that any non-exclusive grant of easement be construed so as to encumber only a lesser estate than fee title because the fee owner is always entitled to utilize his real property in any fashion so long as there is no unreasonable interference with rights of easement owners. Thus, California law has explicitly rejected the contention that easement owners have the automatic right to utilize the full extent of any easement if it is subject to an express grant. In this instance, the neighbors have contended that they are entitled to use the entire 50 foot width of easement (or indeed the entirety of the lot) simply because they are holders of an express grant. What the courts have stated, however, is that there is no right granted an owner of an easement to utilize the width of the grant when it is not required for access. As a consequence, it has been expressly held that the owner of the servient tenement may obstruct portions of the granted easement that do not interfere with reasonable use of the road. The particular case to which I have made reference was actually decided in 1995. In the balance of its holding, the court noted that the grant of easement does not convey a right to use it beyond what is reasonably required for its purpose and if the entirety of the easement is not reasonably required for road use, the owner of the servient tenement may use or block the remaining portion. In the particular case, the easement holder had used only 15 feet of a 52 foot wide non-exclusive easement for ingress and egress. The court held that added pavement through the entire width was simply not reasonably necessary for the enjoyment of the easement and considered it an undue burden on the servient tenement that had to be removed.

In reality and in contrast to the neighbors' claims, the access easement is no greater than 50 feet wide and probably is in fact confined to the paved section of roadway. Since the Holt development does not in any fashion impinge even on the 50 foot wide claim of easement, there can be no basis for objection to placement of the proposed home and its development. The limitation of the easement to less than the entirety of the lot is supported by California case law and the record documents which make clear that less than the entirety of the lot is subject to easement.

The whole application should be considered on its merits without regard to the easement issue. Since the application satisfies all City requirements, it should be granted.

Very truly yours,

David J. Bowie

Cc: Christine Sinnette
Dick Holt

Sinnette, Christine

From: Rick Humann [rhumann@pacbell.net]
Sent: Thursday, August 21, 2008 10:46 AM
To: Sinnette, Christine
Subject: PC Meeting of 8/21 - Holt Applicaiton

Hi Christine,

As indicated to Niroop earlier this week, I will not be able to attend the Planning Commission meeting of this evening.

I would like however, to briefly address the drainage aspects of the Holt Application, and since you are the assigned planner, I would appreciate it if you could pass along my comments to the commission.

Our office has reviewed the hydrology calculations prepared by Schell & Martin along with their associated correspondence, and we are in complete agreement with their methods and findings. We have also reviewed the correspondence form Mr. Gospodarowicz which challenges the Schell & Martin reports, and can find no credible scientific evidence therein to support any of Mr. Gospodarowicz's s claims. Accordingly, we agree with Mr. Howard's response of August 20, which further explains the basis of their reports and proposed design concepts.

I am also compelled to point out, especially in light of the assertion of fraud by Ms. Hehmeyer, that Schell & Martin enjoys an excellent reputation throughout the Lamorinda area, and routinely provides consulting services relating to grading, draining and hydrology. Howard Martin is a licensed civil engineer who is in fact allowed to address matters pertaining to storm drainage under California Law, as are the two civil engineers on my staff who reviewed Mr. Martin's reports. Our firm is has been in Lafayette for over 41 years, and the only other civil engineering and land surveying firm who has been here longer is Schell & Martin.

I strongly urge the commission to allow the professionals, including it's own extremely competent and thorough City Engineer, to review and process these technical matters as the project evolves, and instead, concentrate on discussing matters pertaining to the planning of this application, including the visual impacts and necessary mitigating measures that are needed to bring this proposed home into compliance with the overall neighborhood.

Thank you for your time, and I apologize for not being able to personally attend the meeting.

Rick

Rick Humann
Humann Company Inc.
Civil Engineers and Land Surveyors
1021 Brown Avenue

SCHELL & MARTIN, INC.
CIVIL ENGINEERING & LAND SURVEYING
3377 MT. DIABLO BLVD., LAFAYETTE, CA 94549-4085 PHONE 925-283-8111 FAX 925-283-2866

July 21, 2008

City of Lafayette
3675 Mt. Diablo Blvd., Suite 210
Lafayette, CA 94549

RECEIVED
JUL 22 2008
CITY OF LAFAYETTE
PLANNING DEPT.

Attention: Christine Sinnette, Planning Department

Subject: HDP 47-07, Lot 66, Tract 533-2

I am writing this in response to a letter sent to the Planning Commission from Carol Hehmeyer dated July 17, 2008 regarding the Richard Holt application HDP 47-07. This letter characterized certain work by Schell and Martin as fraudulent, misleading and unprofessional. I find these comments defamatory and unfounded. Much of what I will discuss in this letter has previously been discussed with you over the course of the project, but I feel required to submit a formal response letter. Please forward this to the Planning Commission.

Our office did a survey for Ms. Hehmeyer on her property at 11 Sessions Road in the spring of 2004. Her property was Parcel "C" of MS 502-94, a subdivision that this firm did for Petar Jakovina. We began work on the Jakovina project in 1989 and filed the Parcel Map in 1998.
In 2003, architect E.G. Craig hired this firm to shoot topography of Lot 66 and prepare legal descriptions for the relocation of a PG&E easement over the easterly portion of Lot 66. PG&E's gas lines did not lie in this easterly portion of Lot 66, but rather in and near the roadway known as Sessions Road. On the original map dated 10/27/03 for Mr. Craig, we labeled the hiking trail easement "Sessions Road, 50' R/W PER 98-0044267". This map also shows the 50' wide Gas and Electric Underground R/W per 4148- OR 921 along the easterly side of Lot 66 that was to be relocated. An updated map was prepared with a revision date of 3/10/05 showing the relocated PG&E easement based upon the documents that we prepared, that also had the call for Sessions Road as mentioned above. In June 2007 (or perhaps earlier), Ms. Hehmeyer pointed out to the city that the deed reference was to the trail, not the road. After a call from you, we revised the map to show that the deed reference for Sessions Road was specifically for the trail easement (which was created for and intended to be the description for the roadway as I will discuss later). I do not have copies of Mr. Craig's earliest site plans, but apparently he had used our base map with the reference mentioned above.

Ms. Hehmeyer made at least two visits to our office to discuss this project. With her first visit, Ms. Hehmeyer wanted to look at the maps that we had prepared for Mr. Craig. She alleged that Mr. Craig was changing our map to hide trees and that this was fraudulent. I explained to her at the time that it was more likely shading that he had placed over our map to indicate tree drip lines and that it had printed too dark. The next time she tried to contact this office to discuss access issues with us, we told her that she should discuss the matter with our client's attorney David Bowie, as we did not have permission from our client to review their project with unauthorized persons. Her letter to the Commission dated May 17, 2007 was written after her second visit. She requested that "Schell and

Martin come before the Planning Commission …to explain why, on the survey map which they drafted for this Application, they mark a 50' road easement through Lot 66". This was the first time that I became aware of her claims. Her statement that the "grant of Lot 66, and its entirety, as an access easement…" is erroneous. The documents, including her own deed says "…over, under, along and through Lot 66…" It does not describe the entire lot, rather a roadway through the lot. In preparing legal descriptions for roadway easements these words are typically used and then followed by the wording "over the following described strip of land." Ms. Hehmeyer's legal description was poorly prepared and incomplete as it did not refer to the deed that is discussed in this letter. Clearly in the prior recorded documents it refers to the roadway, Sessions Road (Drive). As requested by the city, we revised the map (revision date 6/20/07) to add clarity and show all the easements on the parcel, with additional information on the continuation of the easement abutting the parcel to the north up Sessions Road.

When we were working on the Jakovina subdivision our focus was on the large parcel of land that ultimately became four parcels. As a condition of approval, Jakovina had to grant a trail easement to the city. At that time the intent was to allow people to walk up the roadway along the paved portion of Sessions Drive to the trailhead. Although there is room alongside the pavement for pedestrians over a portion of Lot 66, the only place to walk to the trailhead further uphill is on the pavement as there is no shoulder to speak of in this area. The planning commission directed us to make Sessions Road the trail easement up to the start of the trailhead.

Looking at the deeds for access to the Jakovina property showed that an easement existed through Lot 66 per 5296 OR 435. This document (see attached copy with highlights) is an indenture made between Western Title and Sessions. It provides a metes and bounds description of Sessions "Drive" starting at the north line of Lot 66 and as described in paragraph (c) as "over Lot 66". In the following paragraph (d) it states "over the **strip** of land on Lot 66 known as Sessions Drive…" again, as it does elsewhere in this indenture. (Emphasis added). As there was no metes and bounds description for Sessions Road "Drive", Schell and Martin computed and prepared a legal description for the trail/roadway that aligned with the metes and bounds portion of the description starting at the north line of Lot 66, and did a "best fit" of a 50 foot easement over the pavement which was located for this purpose. The intent at that time was that this description would also serve as a metes and bounds description of the physical location of Sessions Road as provided for in the legal description mentioned above. If we had only intended it to be a trail easement we would have written a description for a 20 foot wide easement as is shown elsewhere on our subdivision map. If you look at the recorded plat map for the trail easement you will see the words "Sessions Road 50' R/W" (see attached document). As the actual roadway gets closer to the southwesterly corner of Lot 66, we made the 50 foot trail easement westerly line tie into the southwest corner rather than have it terminate in the westerly line. On our Parcel Map we showed the 50 foot trail easement and arrows to both sides of Lot 66 with the words "Non-exclusive Access & Utility Easement (5054 OR 439). As there was no metes and bounds description as stated above, this was a way to indicate that an easement existed that provided access from Sierra Vista to the Jakovina subdivision. It is understandable that this may have added to the neighbors' confusion.

It is common survey practice to prepare a metes and bounds description for an easement based upon the location of a roadway. Typically we try to center the roadway in the easement and align this easement in a logical way. This was how the trail easement was prepared. It is also common business practice when we work for a client that we respect that client's wishes and not discuss the project with

neighbors if so directed. I was told not to discuss this issue with Ms. Hehmeyer. Clearly there was no intention to commit fraud on our part or mislead anyone. It is my opinion that this trail easement is the best possible description to cover the true location of Sessions Road as provided for in the above mentioned document. Carol Hehmeyer uses the words "fraud" or "fraudulent" no less than eight times in a letter that seems intent on discrediting me personally.

Before she gets to page 3 of her letter, where she states that "Mr. Martin actually should not be presenting testimony or evidence on this application, as a professional, at all…", Ms. Hehmeyer questions my hydrology report and further goes on to say that I am not a geologist. Article 3, section 6731 of the Professional Engineers Act gives the definition of civil engineering and it states that " civil engineering embraces the following studies and activities in connection with fixed works for irrigation, drainage, waterpower, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, grading, framed and homogeneous structures, buildings, or bridges…" A hydrologist may or may not be a registered civil engineer. I am not a geologist. By definition, since I am a registered civil engineer, I am qualified to address water runoff issues.

I have worked at this firm since 1977 and have a wide range of experience in grading, sewer systems and storm water systems. I have been a registered civil engineer since 1995 and a licensed surveyor since 1992. I did the original hydrology and hydraulic calculations for the Jakovina project showing the adequacy of the existing storm drain at the intersection of Sessions Road and Sierra Vista. At the June 5th Planning Commission meeting, the applicant was directed to provide a hydrology and a watershed map. I used existing topography from our Tentative Map for the Jakovina subdivision and topography taken for our Lot 66 survey to determine the watershed map. Topography is the only accurate means of determining overland flow of water. This was what was presented in my drainage study dated June 12, 2008.

The Hehmeyer accusations of fraud and/or fraudulent conduct were and are totally irresponsible. Ms. Hehmeyer's letter shows a sophomoric understanding of construing land descriptions and has inflamed the neighbors with her accusations. Neighbors have taken her lead and written letters of their own based upon her comments. I trust that this letter serves to clarify Schell and Martin's involvement in this project, and that all work performed by Schell and Martin - and by me, personally - was undertaken in good faith and in accordance with professional standards and good engineering and surveying custom and practice. Furthermore, I hope that my explanation of our interpretation of the legal description of which I've attached a copy is clear. I would be happy to provide further clarification to this Commission, as necessary.

Please call me if you have any questions.

Very truly yours,

Howard G. Martin, RCE, LS

BOOK 5296 PC 435

5732

JAN 31 1967

Order No. W-299197 and W-340208

This indenture made between Western Title Guaranty Company Contra Costa County Division, a corporation, hereinafter referred to as "Western," Edson O. Sessions and Frances B. Sessions, his wife, hereinafter referred to as "Sessions," and Alberdan, Inc., a corporation, hereinafter referred to as "Alberdan," to wit:

WHEREAS, Western holds record title to those parcels of land described as Parcels One, Two, Three, Four, Five and Twelve in the deed from Edson O. Sessins, et ux, recorded February 9, 1966, Book 5054, Official Records, page 439, and those parcels of land described as Parcels One, Two, Three and Four in the deed from Alberdan, Inc., recorded February 9, 1966, Book 5054, Official Records, page 447; and

WHEREAS, Sessions is the record owner of the parcels of land designated as Parcel "B" and Parcel "C" on the map of the Record of Survey, filed November 17, 1966, Book 45, Licensed Surveyors Maps, page 32, Contra Costa County records; and

WHEREAS, it is the desire of all of the parties hereto for themselves, their heirs, successors and assigns, that certain rights of way heretofore created for their benefit as a part of and as an appurtenance to all of the parcels of land above referred to shall be eliminated of record, and that new rights of way shall be created over a 50 feet in width strip of land known as Sessions Drive, hereinafter described, and over Lot 66, map of Tract No. 533-2, filed March 12, 1954, Map Book 53, page 12, Contra Costa County records;

NOW, THEREFORE, for valuable consideration

(a) Western and Alberdan for the purpose of eliminating of record the easements next hereinafter referred to, grant to Western and to Sessions the easement for road and public utility purposes described in the deed from Edson O. Sessions, et ux, to Alberdan, Inc., recorded February 9, 1966, Book 5054 Official Records, page 437, and the easement for road and public utility purposes described as Parcel Two in the deed from Edson O. Sessions, et ux, to Dana Murdock, et ux, recorded April 18, 1962, Book 4100, Official Records, page 479.

(b) Sessions for the purpose of eliminating of record the rights of way next hereinafter referred to, grants to Western the rights of way excepted from Parcels One and Twelve as described in the deed from Edson O. Sessions, et ux, to Western Title Guaranty Company Contra Costa County Division, recorded February 9, 1966, Book 5054, Official Records, page 439.

(c) Western and Sessions grant to Western a nonexclusive easement for ingress and egress as an appurtenance to the parcels of land described as Parcels One, Two, Three and Four in the deed from Alberdan, Inc., recorded February 9, 1966, Book 5054, Official Records, page 447 over Lot 66, map of Tract No. 533-2, filed March 12, 1954, Map Book 53, page 12, Contra Costa County records, and over the 50 feet in width strip of land known as Sessions Drive hereinafter described.

RECORDED AT REQUEST OF
WESTERN TITLE GUARANTY COMPANY
CONTRA COSTA COUNTY DIVISION

JAN 31 1967
AT 1:10 O'CLOCK P M.
CONTRA COSTA COUNTY RECORDS
FEE $ 5.20
W. J. PAASCH
COUNTY RECORDS

Description: Contra Costa,CA Document-Book.Page 5296.435 Page: 1 of 5
Order: 2 Comment:

(d) Subject to the provisions of this indenture including, but not limited to, the right to alter the location, width and grade of the easement hereinafter described, Western and Sessions grant to Sessions a nonexclusive easement for ingress and egress as an appurtenance to Parcel "B" and Parcel "C," as designated on the map of the Record of Survey, filed November 17, 1966, Book 45, licensed Surveyors Maps, page 32, over the strip of land on Lot 66 known as Sessions Drive, which Lot 66 is described in map of Tract No. 533-2, filed March 12, 1954, Map Book 53, page 12, Contra Costa County records, and over the 50 feet in width strip of land known as Sessions Drive, which 50 foot strip is hereinafter described.

(e) Western and Sessions grant to Western a nonexclusive easement for ingress and egress as an appurtenance to the parcels of land described as Parcels One, Two, Three, Four, Five and Twelve in the deed from Edson O. Sessions, et ux, recorded February 9, 1966, Book 5054, Official Records, page 439, over Lot 66, map of Tract No. 533-2, filed March 12, 1954, Map Book 53, page 12, Contra Costa County records, and over the 50 feet in width strip of land known as Sessions Drive, hereinafter described.

The strip of land above referred to, known as Sessions Drive, is described as follows:

That parcel of land in the County of Contra Costa, State of California, being a strip of land 50 feet in width, the center line of which is described as follows:

Beginning on the northeast line of Lot 66, as designated on the map of Tract No. 533-2, La Canyada Park Unit No. 2, filed March 12, 1954, Map Book 53, page 12, Contra Costa County records, distant thereon north 59°23'18" west, 28.30 feet from the northeast corner thereof; thence from said point of beginning northeasterly along the arc of a curve to the left with a radius of 520 feet, the center of which bears north 49°28'27" west, an arc distance of 98.56 feet; thence north 29°40' east, tangent to the last curve 146 feet; thence northeasterly along the arc of a curve to the right with a radius of 550 feet, tangent to the last course, an arc distance of 71.20 feet; thence northeasterly and northwesterly along the arc of a reverse curve to the left, with a radius of 75 feet, the center of which bears north 52°55' west, an arc distance of 115.15 feet; thence northwesterly, northerly and northeasterly along the arc of a reverse curve to the right, with a radius of 80 feet, the center of which bears north 39°06' 48" east, an arc distance of 207.65 feet; thence south 82°10' east, tangent to the last curve, 163.26 feet; thence northeasterly, northerly and northwesterly along the arc of a curve to the left, with a radius of 75 feet, tangent to the last course, an arc distance of 203.33 feet; thence north 57°30' west, tangent to the last curve, 40 feet; thence

Description: Contra Costa,CA Document-Book.Page 5296.435 Page: 2 of 5
Order: 2 Comment:

northwesterly and northerly along the arc of a curve to the right, with a radius of 85 feet, tangent to the last course an arc distance of 129.07 feet;thence northeasterly along the arc of a compound curve to the right with a radius of 350 feet, the center of which bears south 60° 30' east, an arc distance of 118.10 feet; thence north 48°50' east, tangent to the last curve, 357.98 feet; thence north 83°30' west, 71.88 feet; thence northwesterly along the arc of a curve to the right, with a radius of 85 feet, tangent to the last course, an arc distance of 49.95 feet; thence north 49°50' west, tangent to the last curve, 44 feet.

It is agreed between the parties hereto for themselves, their heirs and successors or assigns, as follows:

1. Subject to the limitations stated below, Western may, at its expense, alter the location, width and grade of the entirety of Sessions Drive, including that strip of land over Lot 66 known as Sessions Drive, and that portion of Sessions Drive contained within the Sessions home site (which is defined as the property referred to as Parcel "B" and Parcel "C" herein) and including the easement described in paragraph "d" in accordance with the suggestions of all appropriate regulatory authorities whose permission is required to file a final subdivision map for the property held by Western. Western may subdivide said property and make and dedicate said entirety of Sessions Drive as a public street, provided, however, that any alteration in the existing road on Sessions Drive abutting Parcels "B" and "C" shall be made downhill from the uphill line of the existing road, and that no encroachment of the road will be made closer to the Sessions home than the edge of the existing paved road ditch on the Sessions home side of the existing road, and that no change in the grade of the road through Parcels "B" and "C" will be made without Sessions permission. Notwithstanding anything in the foregoing to the contrary, Western will not move said Sessions Drive so as to encroach upon that portion of Parcel "B" described as follows:

Beginning at a point in the center line of Sessions Drive at the most southwesterly corner of Parcel "B" thence north 34°33'25" east to the center line of Sessions Drive, thence easterly, southerly and westerly along the center line of Sessions Drive to the point of beginning; provided, however, that Western shall have the right to widen the existing paved road on Sessions Drive at any time to meet any requirements of any regulatory authority whose permission is required for any subdivision and may in so widening said road encroach upon the aforementioned portion of Parcel "B" abutting the existing paved road but not more than 10 feet.

The easements to which reference is made in paragraphs (c), (d) and (e) are easements on and over the strip of land known as Sessions Drive and whenever the location of Sessions Drive is altered as provided for in this indenture the easements are thereby altered in the same way.

Description: Contra Costa,CA Document-Book.Page 5296.435 Page: 3 of 5
Order: 2 Comment:

2. That all roadwork done will be done by Western in such manner as to keep Sessions Drive open at all times.

3. That any damage caused by Western to any portion of Sessions Drive with respect to which Sessions retains either ownership or an easement will be repaired without cost to Sessions. Sessions will pay up to $100 per year, as required, to maintain the entirety of Sessions Drive, until such time as a subdivision map is filed affecting the property BY WESTERN.

4. That any utilities now serving the Sessions residence including, but without limitation, the water line located in the center of the road leading from Brown Avenue, shall not be damaged or cut off by Western.

5. (a) That no party will attempt to change the name of Sessions Drive without the consent of Sessions.

(b) That, subject to the provisions and limitations of paragraph 1 above, Sessions and Alberdan will cooperate with Western, including execution of documents, in connection with Western's attempts to rezone, subdivide, obtain land use permits, record tentative and final subdivision maps and all other matters between Western and all regulatory authorities concerning the use and development for single family residential purposes of the aforementioned property held by Western; and Sessions will cooperate with Western and sign all necessary documents to cause the entirety of Sessions Drive to be dedicated and accepted as a public street, in accordance with the subdivision plans of Western.

6. That to the extent not inconsistent with Western's plans for the use or improvement of Lot 66, the landscaping on Lot 66 will be maintained, without expense to Sessions, in an aesthetically acceptable condition.

7. The agreements set forth in paragraphs 1 through 6, inclusive, of this indenture are covenants which run with the land. No person shall be liable for any breach of any obligation set forth in paragraphs 1 through 6, inclusive, which breach occurs prior to having acquired or after having parted with his fee which is burdened by any such obligation.

8. All of the easements and agreements hereinbefore set forth shall be binding upon and shall inure to the benefit of, as the case may be, the heirs, successors and assigns of the parties hereto.

9. Western joins in the execution of this deed and agreement without warranty, express or implied.

IN WITNESS WHEREOF, said corporations have executed these presents by their officers duly authorized, and WITNESS the hands of the individuals herein named, this 30TH day of JANUARY, 1967.

Edson O. Sessions

Frances B. Sessions

WESTERN TITLE GUARANTY COMPANY SEAL AFFIXED
CONTRA COSTA COUNTY DIVISION

By James L. Hegland, Vice President

By William Nienburg, Assistant Secretary

ALBERDAN, INC.

By [illegible] President

-4- Dana Murdock, Secretary

SEAL AFFIXED

Description: Contra Costa, CA Document-Book.Page 5296.435 Page: 4 of 5
Order: 2 Comment:

STATE OF CALIFORNIA
County of Contra Costa } ss.
County in which acknowledgment is taken

On January 30, 1967 19___ before me, Robert Eshleman
Write or type name of notary

a Notary Public, in and for said** County and State, personally appeared
Edson O. Sessions and Frances B. Sessions

known to me to be the person S whose name S are subscribed to the within instrument, and acknowledged to me that they executed the same.

ROBERT ESHLEMAN
Notary Public
Contra Costa County
State of California

Robert Eshleman
In addition to signature type or print name of notary
Notary Public

**If notary is commissioned in another County strike "said" and name County.

STATE OF CALIFORNIA
County of Contra Costa } ss.
County in which acknowledgment is taken

On January 30,1967 before me, Robert Eshleman a Notary Public, in and for said**
Write or type name of notary

County and State, personally appeared Wm. E. Berk and Dana Murdock

known to me to be President and Secretary

of the corporation that executed the within instrument and also known to me to be the person S who executed it on behalf of such corporation and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

ROBERT ESHLEMAN
Notary Public
Contra Costa County
State of California

Robert Eshleman
In addition to signature type or print name of notary
Notary Public

**If notary is commissioned in another County strike "said" and name County.

(Corporation Grantor)

STATE OF CALIFORNIA
County of Contra Costa } ss.
County in which acknowledgment is taken

On Jan. 31, 1967 before me, Peggy F. Barry a Notary Public, in and for said**
Write or type name of notary

County and State, personally appeared James L. Hegland and William Nienburg

known to me to be Vice President & Assistant Secretary

of the corporation that executed the within instrument and also known to me to be the person who executed it on behalf of such corporation and acknowledged to me that such corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

PEGGY F. BARRY
Notary Public
Contra Costa County
State of California

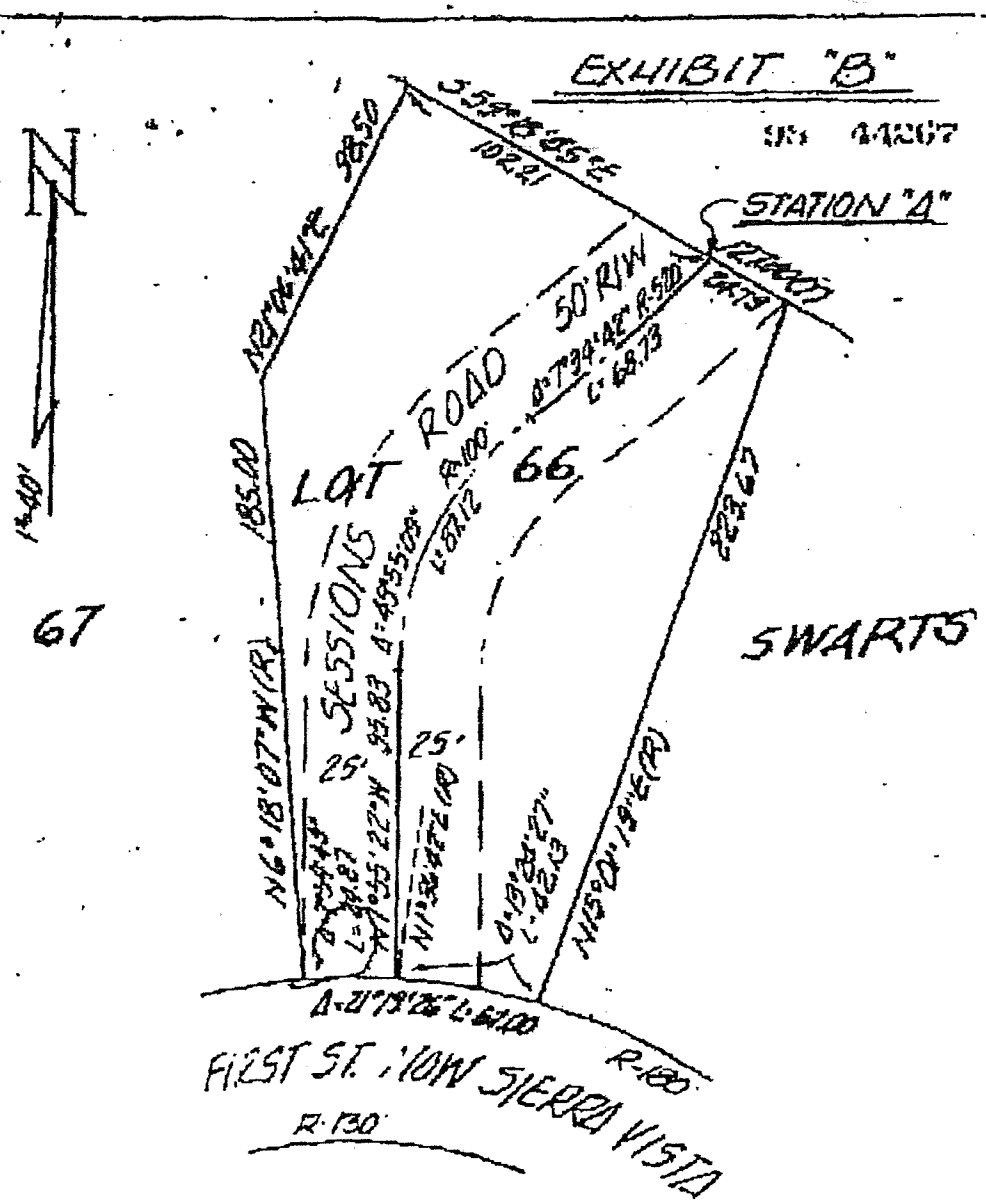
Peggy F. Barry
In addition to signature type or print name of notary
Notary Public

**If notary is commissioned in another County strike "said" and name County.

(Corporation Grantor)

• END OF DOCUMENT •

Description: Contra Costa, CA Document-Book.Page 5296.435 Page: 5 of 5
Order: 2 Comment:



LOT 66, TRACT 533-2 (53 M 12)
LA CANADA PARK - UNIT 2
CONTRA COSTA CO. CALIF.

SCALE 1:40
SEPT 1995
495-B3

SCHELL & MARTIN, INC.
CIVIL ENGINEERING & LAND SURVEYING
3077 MT DIABLO BOULEVARD
LAFAYETTE, CALIFORNIA 94549

Description: Contra Costa,CA Document-Year.DocID 1998.44267 Page: 4 of 5
Order: 1 Comment:

APPROVED PC/DRC ACTIONS; R-10; '07-08

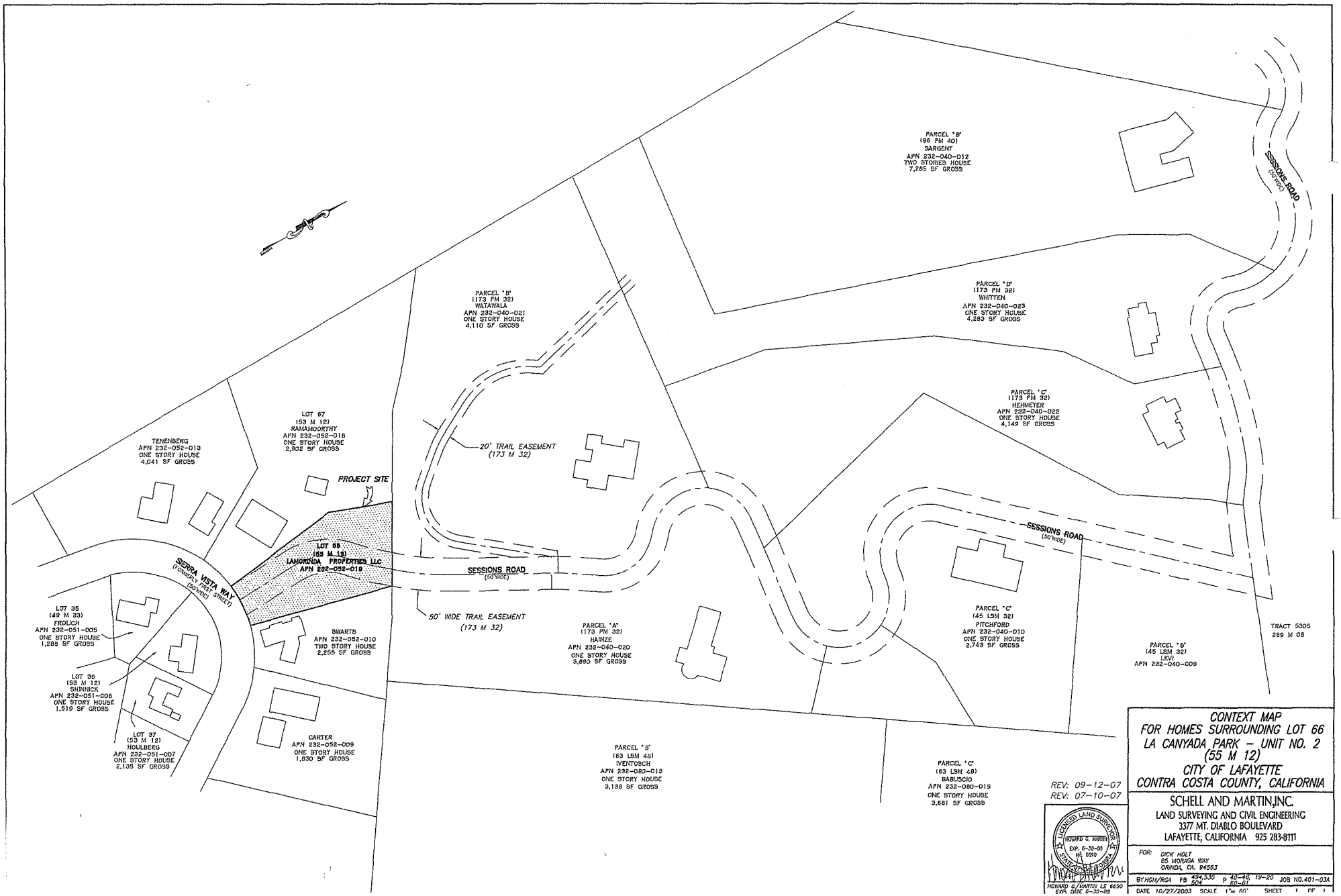
ADDRESS	ACTION REQUESTED/APPROVED	FINAL □'	ASSESSED IMPACT
233 WARNER	2493□' ADDITION	3943	NONE NOTED
60 CAROLYN CT	2552□'/19' HT; NEW VARIANCE; REMOVE 8 TREES	2552	SOME VIEWS OF NEIGHBORS YARDS
1310 EL CURTOLA	1830□' ADDITION/25' HT VARIANCE	4400	CLOSE TO & LOOKS DOWN ON NEIGHBOR; WINDOW
1060 SIERRA VISTA	1875□' ADDITION	4050	NONE NOTED
790 LOS PALOS MNR	4280□', 2 STORY NEW	4280	NONE NOTED
LOS PALOS MNR	4077□', 2STORY NEW, ADD 7 WINDOWS	4077	LOOKS INTO NEIGHBOR'S YD.
479 PEACOCK	SETBACK VARIANCE, ADD 644□'	3792	NONE NOTED
3180 ROHRER	2 STORY ADDITION, 1060□' VARIANCE	2444.	LOOKS DOWN ON NEIGHBOR'S HOUSE AND YARD.
14 BURNT OAK	ADD 933□', 2 STORY	3353	NONE NOTED
369 READ DR.	ADD 2 STORY/GARAGE	4200	LOOKS INTO NEIGHBOR'S YARD.
630 MICHAEL LN.	2 STORY, NEW	3750 APPROX	NONE NOTED
3158 LUCAS DR.	ADD 621□', 2 STORY	2411	LOOKS DOWN ONTO NEIGHBOR
3666 BOYER CIR	ADD 1,035□', REMOVE 15" OAK	3373	LOOKS DOWN ONTO NEIGHBOR
1064 N. THOMPSON	NEW 2 STORY, 3319□'	3319	LOOKS DOWN ONTO NEIGHBOR
1 DOLLIS PARK	VARIANCE, NEW CONSTRUCT, 30' HT	3500	NONE NOTED
0 CREST RD	VARIANCE, NEW 5087□', 30' HT REMOVE 9 TREES	5087	

RECEIVED
SEP 04 2008
CITY OF LAFAYETTE
PLANNING DEPT.

SIERRA VISTA NEIGHBORHOOD.

ADDRESS	HOUSE SIZE □'	STORY	LOCATION
1117 SIERRA VISTA	2900	2	IMMEDIATELY TO WEST
1139 SIERRA VISTA	2255	2	NEIGHBOR TO EAST
1097 SIERRA VISTA	2012	2	5 BEDROOMS / 3 BATHS —
1092 SIERRA VISTA	2419	2	☐ MAY BE UNDERSTATED.
1060 SIERRA VISTA	4150	2	

401-03A



CONTEXT MAP
FOR HOMES SURROUNDING LOT 66
LA CANYADA PARK – UNIT NO. 2
(55 M 12)
CITY OF LAFAYETTE
CONTRA COSTA COUNTY, CALIFORNIA

REV: 09-12-07
REV: 07-10-07

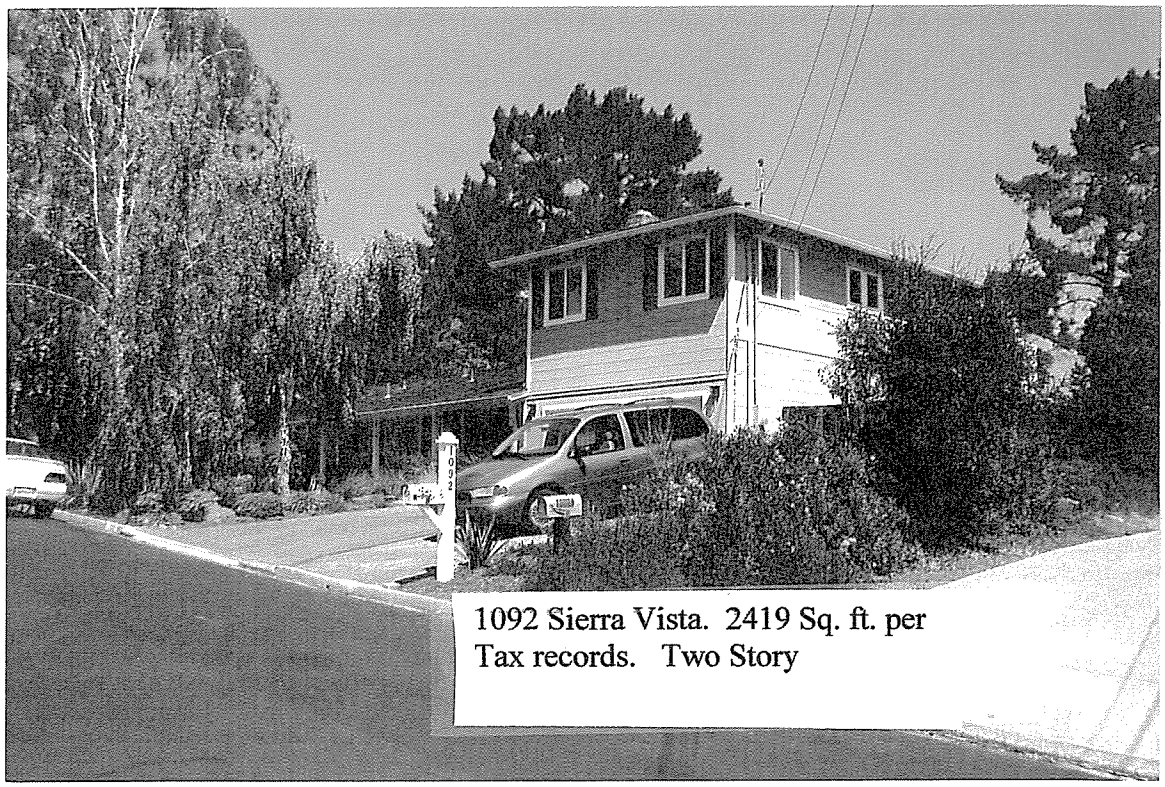
LICENSED LAND SURVEYOR
HOWARD G. MARTIN
EXP. 6-30-08
NO. 6690
STATE OF CALIFORNIA

HOWARD G. MARTIN LS 6690
EXP. DATE 6-30-08

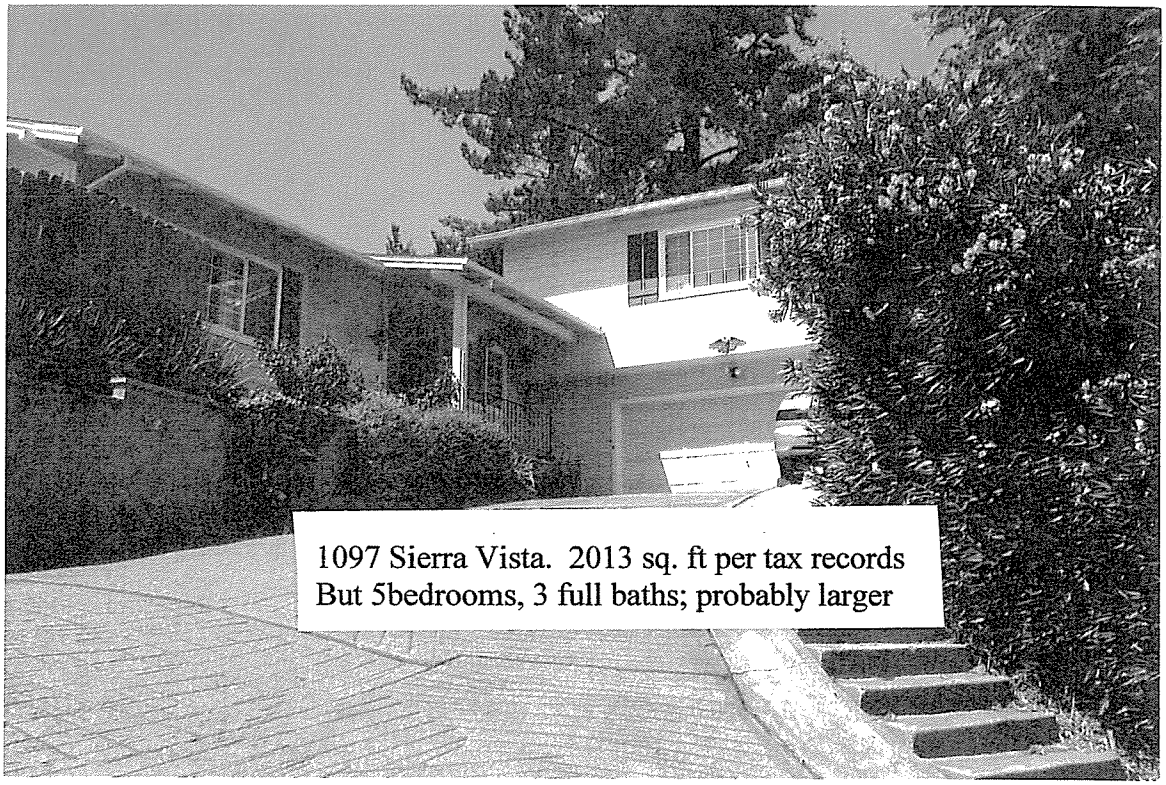
SCHELL AND MARTIN, INC.
LAND SURVEYING AND CIVIL ENGINEERING
3377 MT. DIABLO BOULEVARD
LAFAYETTE, CALIFORNIA 925 283-8111

FOR: DICK HOLT
85 MORAGA WAY
ORINDA, CA. 94563

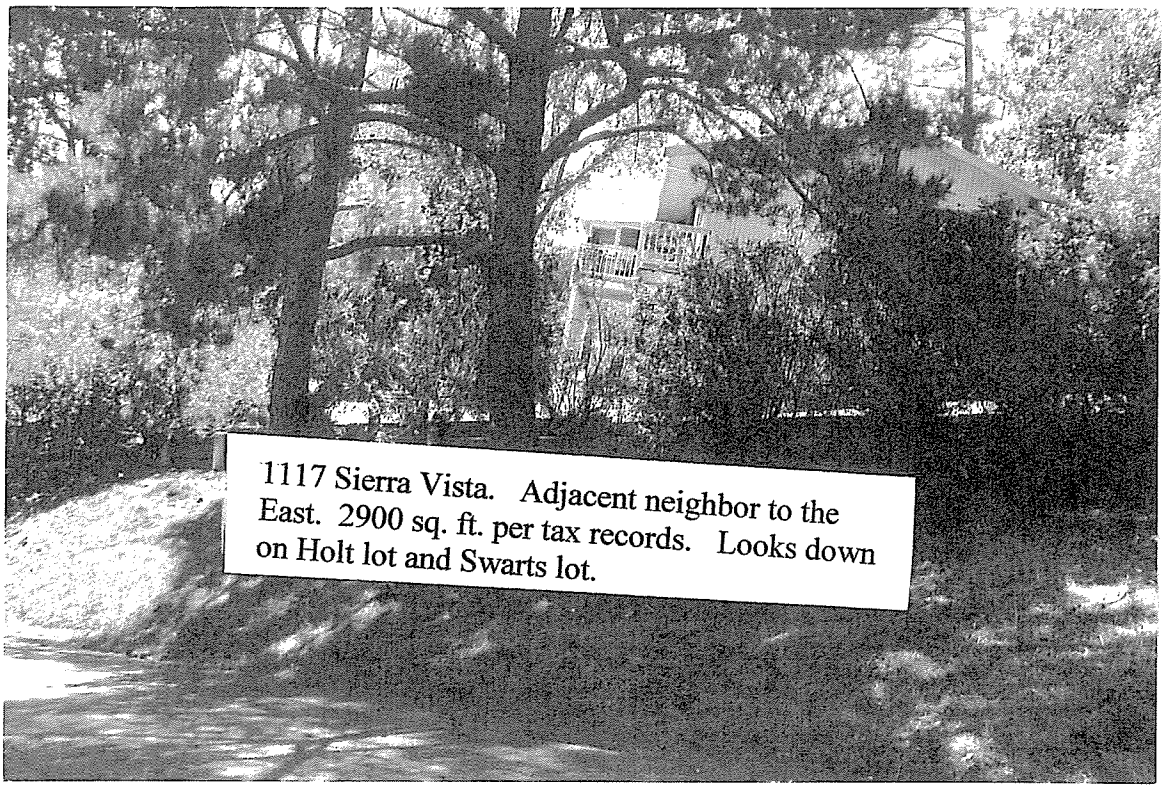
BY HGM/RGA FB 494,530 P 40-46, 19-20 JOB NO. 401-03A
504 60-61
DATE 10/27/2003 SCALE 1"= 60' SHEET 1 OF 1



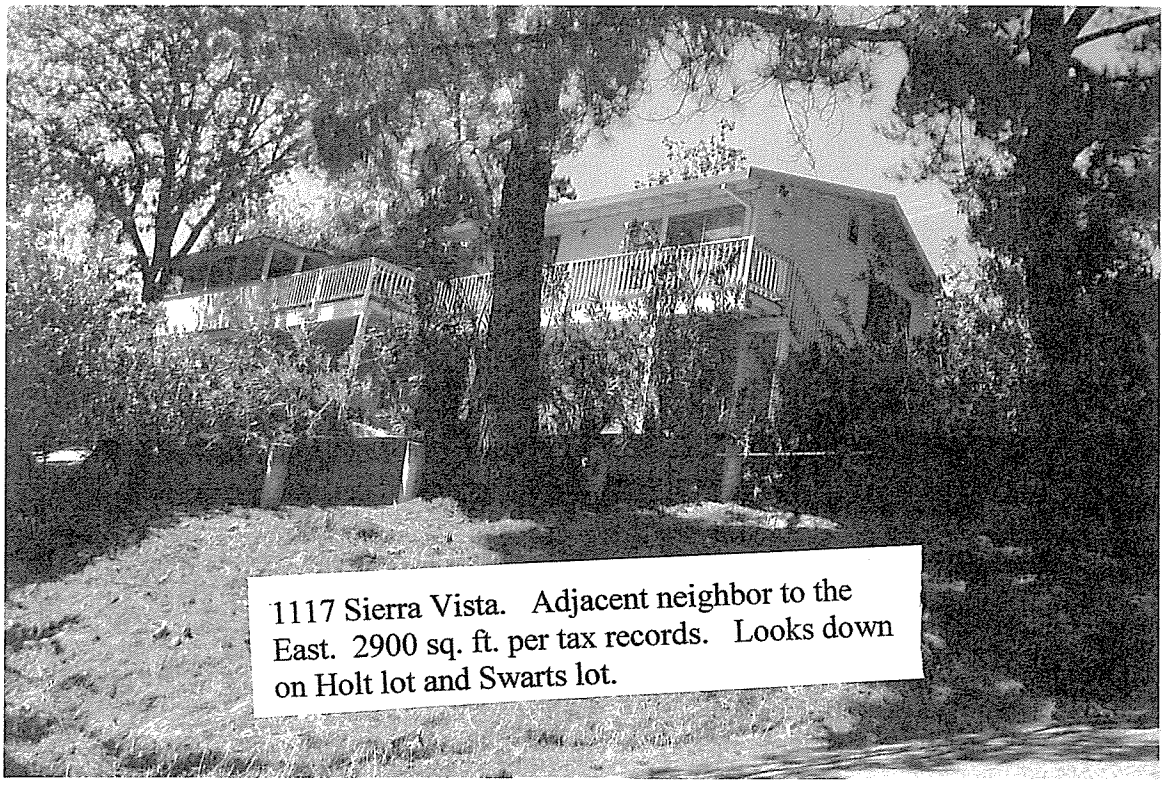
1092 Sierra Vista. 2419 Sq. ft. per Tax records. Two Story



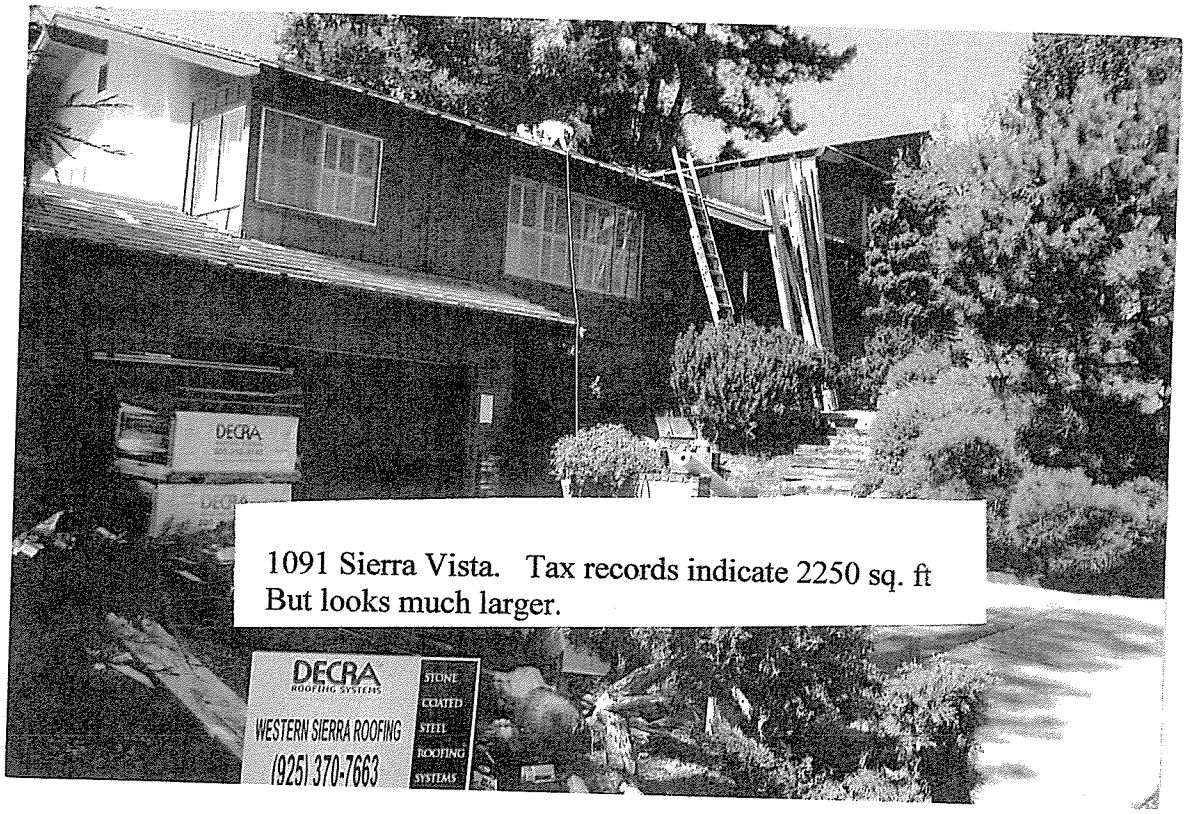
1097 Sierra Vista. 2013 sq. ft per tax records But 5bedrooms, 3 full baths; probably larger



1117 Sierra Vista. Adjacent neighbor to the East. 2900 sq. ft. per tax records. Looks down on Holt lot and Swarts lot.



1117 Sierra Vista. Adjacent neighbor to the East. 2900 sq. ft. per tax records. Looks down on Holt lot and Swarts lot.



1091 Sierra Vista. Tax records indicate 2250 sq. ft
But looks much larger.

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JUN 23 2008
CITY OF LAFAYETTE
PLANNING DEPT.

18 June, 2008

From: Richard and Robin Holt
To: Planning Commission and Planning Staff

Re: House Siting on Lot 66, HDP 47-07

1. Regarding the determination of the house site, we would like to point out that the lot constraints, e.g., the easement and property setbacks, the topography, and the necessity to safely enter and leave the property, as required by the Fire Marshal, as well as common sense and adherence to good safety practices, have dictated the only place on the entire lot where one could build a house, and that is where it is presently sited. Additionally, and acting upon direction from the Planning Commission and to lessen/mitigate the privacy issues relating to the Swarts residence immediately to the East, the house has been moved up the hill to the North, decreased in size considerably to what we had originally envisioned, and dug into the hill to the North as much as is feasible.

2. Thank you for your consideration and understanding of a very difficult problem we had in siting this home.

Cc: Dave Bowie
Howard Martin
E.G. Craig

LAW OFFICE OF DAVID J. BOWIE
Attorney at Law
2255 CONTRA COSTA BLVD., SUITE 305
PLEASANT HILL, CA 94523

RECEIVED
AUG 2 0 2008
CITY OF LAFAYETTE
PLANNING DEPT.

DAVID J. BOWIE

Telephone (925) 939-5300
Facsimile (925) 609-9670
Dave@bblandlaw.com

August 18, 2008

Christine Sinnette
City of Lafayette
3675 Mt Diablo Blvd, Suite, 210
Lafayette, CA 94549

Re: Holt Application Lot 66 Sierra Vista Way

Dear Christine:

As you are aware, Richard Holt of LaMorinda Properties has retained the services of Steve Kubichek as project designer to rework the proposed home to be constructed on Lot 66 at the intersection of Sierra Vista Way and Sessions Road. The structure has been relocated from its prior site so that it might materially lessen any perceived invasion of privacy as to the adjoining residence. Due in part to that relocation, it is necessary that a variance be granted.

As you know, Lot 66 is currently burdened by a trail easement created by grant as a part of Subdivision MS 502-94. The actual metes and bounds description of the trail easement was created by the engineering firm of Schell & Martin. It is also the case that Sessions Road is a private easement which burdens Lot 66. Neighbors have contended that the entirety of Lot 66 is burdened by easements such that it might not be developed under any circumstances. A careful review of record title indicates that this is not in fact the case. The project engineer, Schell & Martin, has identified a road easement for Sessions Road coincident with the trail easement. This particular identification is based at least in part upon the Sessions Road and trail easements to the north of Lot 66. In any case, disputes regarding easements are this instance private matters which do not involve the City of Lafayette.

A variance has been requested in order to site the house as presently proposed, to mitigate privacy concerns, and to apply for tree retention and landscape screening. The current proposal would have the house set back from Sierra Vista a distance greater than 80 feet. The rear yard setback is proposed at a distance of at least 60 feet. The setback from the Schwartz residence to the east will be 10 feet, although major portions of the home will be inset a further five feet to increase the separation between structure and property line as much as possible. The setback from the trail easement and easement for Sessions Road as identified by the engineer would be

only five feet. Obviously, a greater setback is required regardless of whether or not the subject lot is considered a corner lot. (It might be noted that I do not believe the lot is a corner lot for reasons previously voiced).

The record regarding the Holt application is replete with references to the many constraints which burden Lot 66 and its development. It is precisely those many constraints which justify the grant of a variance pursuant to the Lafayette Municipal Code.

Section 6-214 of the Lafayette Municipal Code defines a variance as a modification of the requirements in zoning regulations in a number of respects. A variance may only be granted when (i) special circumstances concerning the subject property exist such that strict application of zoning regulations would deprive the property of privileges enjoyed by other properties in the vicinity and in the same Land Use District; (ii) the grant would not constitute a matter of special privilege not generally available in the vicinity; and (iii) the variance substantially complies with the intent and purpose for the Land Use District for which the property is classified. I believe that staff understands that findings for a variance can be supported by ample evidence in the Administrative Record. The balance of this letter will set forth my thoughts regarding such findings.

The special circumstances which concern the subject property include the fact that it is bisected by the road easement constituting Sessions Road and a trail easement requested by the City of Lafayette and which parallels the road. These easements reduce the area for development. Much of the remaining lot area is quite steep leaving a relatively small building envelope. As was noted by the Planning Commission in earlier hearings, development to the west of Sessions Road would be extremely difficult in the sense that a reasonably sized home could not be placed at that location. It was that very reason which prompted the Commission to focus solely on the current proposed area for development. Additionally, the currently proposed site has been set back a significant distance from Sierra Vista due to the physical constraints of the proximity of the Swartz residence to the common boundary line with Lot 66 and its failure to observe minimum setback requirements. Concerns over privacy impacts to the adjoining Swartz residence coupled with physical encroachments on Lot 66 by the adjoining property have further constrained development. The failure to grant a variance in this instance would leave a sliver of land so narrow that a reasonably sized home simply could not be constructed as it would be far too narrow and thus out of conformity with surrounding residences and the standards to be expected within Lafayette. In short, there are ample physical circumstances which compel the conclusion that the failure to grant a variance would deprive the subject lot of privileges enjoyed by other properties in the vicinity.

The grant of a variance is obviously not a grant of special privilege. Variances are granted throughout Lafayette and within the Specific Land Use District for precisely the same reasons for which this application has been made in this instance.

The final required finding is that the variance substantially complies with the intent and purpose of the Land Use District. This is a finding easily made since professional engineering testimony has demonstrated that an actual road widening of Sessions Road to the east would be physically impossible and prohibitively expensive. Thus, the look, feel and appearance of

placement of the home relative to Sessions Road and the trail easement will be as though normal setbacks (and then some) were in force and effect. The variance is only a technical requirement—not one which would ever result in a road in close proximity to a structure for which a variance might be granted.

I believe a variance is appropriate with respect to this particular project and I would request that staff create findings including those set forth in this letter in justification of the applicant's request of the Planning Commission.

Please call should you have any questions.

Very truly yours,

David J. Bowie

Cc: Dick Holt
Howard Martin

LAW OFFICES OF
BEST BEST & KRIEGER LLP

December 1, 2008

MEMORANDUM

TO: CITY COUNCIL

FROM: CITY ATTORNEY

RE: LOT 66 VARIANCE

As previously stated, it is the opinion of this office that the issue of whether or not and to what extent Lot 66 ("Property") is encumbered with a private access easement is a civil matter between the affected property owners. However, it is City policy to measure required yard setbacks not only from property lines, but also from vehicular and pedestrian (public or private) access easements. In the event a court were to decide that the private access easement is lot line to lot line, there will be no setback from the easement and the Property owner must receive a variance from the setback requirement to develop the Property. Therefore, this office has recommended out of an abundance of caution that the Property owner voluntarily apply for a variance for setbacks

Because the applicant has voluntarily applied for the variance there is no need for the City to make a determination on the easement. The City should consider the variance request at this time because consideration of applicable setbacks is part of the phase 1 Hillside Development Permit process to determine the site and mass of the single family residence.

Government Code section 65906, provides that a variance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification. Any variance granted shall be subject to conditions that will assure that the adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which the property is situated. Lafayette Municipal Code section 6-214 provides the specific findings necessary for granting a variance as outlined in the Government Code.

The proposed variance would allow the application of the same setbacks from the property line of 20 feet from the front, 15 feet from the rear, and 10 feet from the side that are required of all single family residential property zoned R-10 and is also consistent with other properties in the Sierra Vista Way neighborhood, which have the same R-10 zoning designation. Because all of the properties in the vicinity with identical zoning classifications contain a single family residence on the property, Staff believes that a variance from the private easement that may cover the entire property would not grant a special privilege inconsistent with the limitations upon other properties in the vicinity.

Granting the variance would not address whether development on the Property conflicts with the existing private easement. Therefore, if a court determines that the private easement precludes development on the Property, the Property owner would not be able to develop, even though the City had granted a variance. On the other hand, if the Court determines that the private easement did not preclude development on the Property, the variance would allow a single family residence and not deprive the property of privileges enjoyed by other property owners in the vicinity.

MALATHY SUBRAMANIAN

LAW OFFICES OF
BEST BEST &
KRIEGER LLP

January 4, 2008

MEMORANDUM

TO: **CHRISTINE SINNETTE, SENIOR PLANNER**

FROM: **CITY ATTORNEY**

RE: **HOLT APPLICATION LOT 66 – TRAIL EASEMENT**

You have asked whether the City's Trail Easement Restriction memorandum supercedes the Trail Easement granted to the City over a portion of Lot 66. As we understand, the Applicant intends to access Lot 66 via a portion of the Trail Easement, which is also coterminous with Session Road.

The City received a Grant of Easement for Trail Purposes recorded March 4, 1998 ("Trail Easement"). The Trail Easement is 50 feet wide and is located over a strip of land known as Sessions Road located on Lot 66. The Trail Easement specifies that "vehicles of all kind including bicycles, and motorized vehicles of any kind, are prohibited from use upon any portion of the trail lying outside the Sessions Road Right-of-way."

On July 14, 1992, the Planning Commission approved a memorandum entitled Trail Easement Restrictions. Section 1 of the memorandum states: "A trail easement is not to be used by owners or developers for access to the property while the property is being developed or improved unless such access is approved by the Planning Department."

The Trail Easement does not reference nor incorporate the Planning Commission's memorandum. Furthermore, the Trail Easement specifically provides for vehicular access on the Trail Easement that is coterminous with Sessions Road. Therefore, the Applicant can access Lot 66 via the portion of the Trail Easement that is coterminous with Sessions Road.